UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

FCA US LLC
Respondent

and **CASES 07-CA-219895**
07-CA-221914

LOCAL 723, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO

Union

RESPONDENT FCA US LLC'S BRIEF IN REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully Submitted,

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Date: February 18, 2020

ARGUMENT [1, 2]

On February 4, 2020, Counsel for the General Counsel ("GC") filed an Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision ("Answering Brief"). In the Answering Brief, the GC fails to address, misrepresents, or repeats the errors of the ALJ on a number of key and dispositive issues: **1)** the GC's arguments of relevance regarding items that are not presumptively relevant erroneously rely upon testimony and evidence that the Union failed to identify to Respondent, despite the Union's burden to do so; **2)** the GC, like the ALJ, erroneously asserts that relevance was established because the Union set forth general, boilerplate language that information was needed for "grievance(s)" and to "bargain intelligently," without establishing an actual nexus; **3)** the continuing relevance of outstanding requested information is not established by the record, including the contract language, despite the GC's misrepresentation that it does.[3]

Respondent urges that Respondent's Exceptions to the Administrative Law Judge's Decision be granted and the Consolidated Complaint allegations be dismissed in their entirety. To the extent that the Board finds merit to the Consolidated Complaint allegations, if any, the Union's need for the outstanding information has shown to be moot.

[1] ALJ" refers to Administrative Law Judge Melissa M. Olivero; "ALJD" refers to the ALJ's decision dated November 5, 2019. "Tr." refers to the transcript of the administrative hearing; "GCX," and "RX" refer to Counsel for the General Counsel's exhibits and Respondent's exhibits, respectively. The final four pages of the ALJD (19-22) are not line numbered.

[2] To the extent arguments from the Answering Brief are not addressed herein, Respondent considers them adequately addressed in Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision.

[3] As explained further below, the contractual language relied upon by the GC (JX1, p. 34, Section 30(b)), limits the Union's ability to reinstate a grievance (and only where the grievance was withdrawn without prejudice) to three months from the date the grievance was withdrawn. The grievances the record ties to the requests for information here were withdrawn on September 29, 2018. (RX12) No contractual language allows their reinstatement (See JX1, p. 34, Section 30(b)).

The GC's arguments of relevance regarding items that are not presumptively relevant erroneously rely upon testimony and evidence that the Union failed to identify <u>to Respondent</u>, despite the Union's burden to do so

With regard to the April 17, 2018 request for information (RX4), particularly non-supervisory discipline information[4] and production numbers, the GC and the ALJ erroneously rely upon testimony and exhibits entered at trial to attempt to establish relevance of items when the record establishes the Union never cited these explanations of asserted relevance to Respondent (Answering Brief, p. 13-14; 15-16; ALJD p. 6, lines 5-8; ALJD p. 17, lines 36-38; ALJD p. 19, lines 20-26; ALJD p. 20, lines 1-4). The GC disingenuously attempts to shoehorn record evidence into becoming re-imagined communications of relevance to Respondent.

To this end, the GC cites Willingham's testimony, the substance of which was never shared with Respondent in response to Respondent's relevance challenges, that Newkirt asserted Supervisor Wasielewski "violated Respondent's SOC" to argue relevance was established. (Answering Brief, p. 15; Tr. 79-80; 137-138) The GC then makes the illogical argument that Willingham's statement in the "Contract Section Involved" portion of Newkirt's Grievance No. 18-0064, "MLM past practice and DEP local practice PM&P agreement any other relevant language, law, practice or policy that may apply," should cause Respondent to know Willingham was referencing specific collective bargaining agreement provisions (which do not apply to non-bargaining unit employees) and policies that the GC is arguing have relation to disparate

[4] The GC misrepresents the cadence of Respondent's production, and the ALJ's findings and conclusions pertaining to this item. (Answering Brief, p. 13) Because of the Union's misnumbering, the record establishes that Respondent combined its responses with regard to the list and actual disciplines. Although Respondent has excepted to the ALJ's finding and conclusions, the ALJ has only found that Respondent failed to provide a list and disciplines only for non-bargaining unit employees (See p. 21 of the ALJD, Recommended Order). The GC's assertion that the ALJ found that Respondent failed to respond or produce a list of "all individuals" and "all discipline served" is incorrect. (Answering Brief, p. 13) Moreover, the GC's citation to Section 39 "Maintenance of Discipline" provision of the collective bargaining agreement in this portion of the GC's argument is perplexing as it does not apply to salaried employees. However, the citation does underscore the fact that bargaining unit employees are afforded a contractual progressive discipline policy not available to salaried employees, further undercutting any comparison argument the Union could make. Compare with ***E.I. DuPont De Nemours***, 366 NLRB No. 178, slip op. at 4 (2018)

treatment.[5] The Union did not assert this to Respondent to argue the relevance of non-bargaining unit disciplines, nor does this vague reference in the grievance establish relevance. In addition, the GC falsely declares that Willingham "specifically informed" Weber that the Union required SOC violations pertaining to non-unit, salaried employees in order to determine whether Respondent had engaged in disparate treatment of non-unit salaried employees by its April 24th response to Respondent's relevance inquiry. The April 24th response to Respondent's relevance inquiry is simply a restatement of the Union's request, stating again the information is needed for grievances, and identifying what the information is. There is no mention at all of disparate treatment. (Answering Brief, p. 16, RX5)

With regard to the non-bargaining unit discipline, there is no record evidence that the Union made any representation to Respondent to establish a factual and logical basis for needing the information. ***United States Postal Service***, 310 NLRB 391, 392 (1993); ***Tegna, Inc.***, 367 NLRB No. 71, slip op. at 2 (2019), or even told Respondent it was "investigating Respondent's consistency in enforcing its SOC and disciplinary policy." (Answering Brief, p. 13-14). The ALJ and the GC offer conjecture, but the record is devoid of evidence and facts that the Union met its burden in establishing the relevance of the requested information to Respondent.

Moreover, and unsurprisingly, the GC cites no case law to support finding relevance by relying upon facts, evidence or arguments which were never articulated to Respondent. Indeed, the Board has found the union must demonstrate a reasonable belief in the relevance of non-bargaining unit disciplines to a union's collective bargaining duties supported by objective evidence which **must be communicated to the employer** (emphasis added). ***Disneyland Park***,

[5] The reliance on this grievance to argue it establishes relevance for the Union is ironic given the fact that the GC does not concede its withdrawal renders the request moot.

350 NLRB 1256, 1257-1258 (2007). That was not done here, despite the GC and ALJ's efforts to make it so.

With regard to production numbers, other than point to general, boilerplate language in the requests for information that predated the challenge to relevance and was only regurgitated once the relevance of the items was questioned (RX4, RX5, RX6, RX7), neither the GC[6] nor the ALJ provide anything of substance that was actually communicated to Respondent to support that relevance was established. (Answering Brief, p. 18)

Simply asserting that information is relevant to a grievance without establishing an actual nexus is insufficient to establish that information's relevance

The GC implies (and the ALJ erroneously finds (ALJD p. 15, lines 33-35)) that declaring an item of information relevant to a grievance is enough to make it relevant. This flawed logic would make any item of information relevant by slapping the phrase "needed for a grievance" on the request, and is unsupported by case law. The Board has held that the general type of boilerplate language recited by the Union in its initial request is insufficient to establish relevance, noting that the "theory of relevance must be reasonably specific; general avowals of relevance such as 'to bargain intelligently' and similar boilerplate is insufficient." ***SuperValu Stores, Inc.***, 279 NLRB 22, 25 (1986), affirmed mem., 815 F.2d 712 (8th Cir. 1987); see also ***F.A. Bartlett Tree Expert Co.***, 316 NLRB 1312, 1313 (1995).

Moreover, the Board has held that an employer has no duty to provide information to a union where the union has stated that it needs information to process a grievance, and the union has not demonstrated there is actual relevance to the grievance, even in the case of presumptively

[6] Inexplicably, the GC attacks (Answering Brief, p. 18) the unrefuted (and, to Respondent's understanding, uncontroversial) definition of "production numbers" as "attempts to narrowly define production numbers." (Tr. 186-187)

relevant information. See ***United Parcel Service***, 362 NLRB 160, 161-163 (2015). The union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information. ***Island Creek Coal***, 292 NLRB 480, 490 fn. 19 (1989).

Both the ALJ and the GC (Answering Brief, p. 13-14) creatively make arguments for the Union with regard to how and why the Union may have needed the information it requested when pursuing the Kelli Newkirt grievances, however, the Union failed to assert these reasons to Respondent when Respondent repeatedly asked the relevance. In addition, the GC asserts the requested production numbers "directly relate" to the Union's processing of Newkirt's grievance, but the GC fails to identify how. (Answering Brief, p. 19) The ALJ makes up some arguments for the Union, but, again, these were not communicated to Respondent. Again, as set forth, in the case of information that is not presumptively relevant, it is the Union's burden to establish relevance to Respondent when relevance is questioned, which the Union failed to do with regard the production numbers and non-bargaining unit discipline information.. ***Disneyland Park***, 350 NLRB at 1257-1258.

The GC's implication that Willingham was unaware that Chris Wilson was under investigation for potential FMLA fraud is unsupported by the record[7]

The GC's implication that Willingham was unaware that Chris Wilson was under investigation for potential FMLA fraud is disingenuous and unsupported by the record. (Tr. 106-107) Indeed, Willingham testified that he was present during the meeting which led to his request for Wilson's confidential employee statement, and identified the meeting's purpose as an "investigation into a[n] FMLA absence [Wilson] had." (Tr. 108)

[7] Notably, the GC does not express a position regarding Respondent's request that ***American Baptist Homes of the West d/b/a Piedmont Gardens***, 362 No. 139 (2015) be overturned and the categorical exemption articulated in ***Anheuser-Busch, Inc.***, 237 NLRB 982 (1978), exempting witness statements from disclosure to the Union in response to an information request be restored.

The outstanding requested information is moot

The GC states that the plain text of the contractual language affords the Union the option to reinstate Kelli Newkirt's grievances.[8] (Answering Brief, p. 9; JX1, p. 34, Section 30(b)) This is false. Although there was testimony regarding whether the withdrawal was "without prejudice" or "without precedent," there is no practical impact at this point in time which type it was. Withdrawal "without precedent" means it cannot be reinstated. (JX1, p. 34, Section 30(b)) Withdrawal "without prejudice" allows reinstatement of a grievance within three months of withdrawal. (JX1, p. 34, Section 30(b)). Both grievances filed on behalf of Ms. Newkirt were withdrawn on September 29, 2018. The record is devoid of evidence that there are any other grievances related to the information requested, that there is any other need for the information related to the Union's collective bargaining duties, or that the outstanding information is needed in another forum. Indeed, the Union failed to identify any relevance when Respondent asked after the grievances were withdrawn. (RX25)

The GC stated in his opening statement: "The Union sought the information pertaining to . . Newkirt in order to process existing grievances." (Tr. 18) Likewise, Mark Willingham testified that he submitted the April 17 request for information based off Kelli Newkirt's discipline. (Tr. 76) Similar to ***Borgess Medical Center***, 342 NLRB 1105, 1106 (2004)**,** the Union has not asserted it needs the information to pursue the grievance in another forum and has not indicated that it needs the outstanding information for any other matter related to its collective bargaining duties. Thus, even in the event the outstanding information is deemed relevant (production numbers and non-bargaining unit disciplines) or could somehow be produced even though the record fails to establish it exists (taxi pulls), the information request is moot.

[8] The GC refers to one grievance, but there were two, both of which were withdrawn. (RX12)

CONCLUSION

Based upon the entire record in this case, and upon the arguments recited above and in Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision, it is respectfully requested that Respondent's Exceptions be granted and the Consolidated Complaint be dismissed in its entirety.

Respectfully submitted this 18th day of February, 2020.

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CERTIFICATE OF SERVICE

I certify that on the 18th day of February, 2020, I electronically served copies of **RESPONDENT FCA US LLC'S BRIEF IN REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** on the following parties of record:

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